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United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

William B. Edwards and Robert
L. Culpepper,

Plaintiffs in Error,

vs.

The United States of America,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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I. STATEMENT OF THE CASE.

The statement of the case contained in the brief for plaintiffs in error, on pages 3 and 4, is substantially correct. It will be seen from that statement that the only errors assigned are (1) the refusal to give plaintiff's requested instruction [Tr. pp. 51-2, 91], and (2) the giving by the court of the instruction as shown in the transcript, pages 50, 92, and (3) the error of the court in giving the instruction shown in the transcript, pages 51, 93.

It will further be seen from the statement of the case and from the brief of plaintiffs in error that the only question raised by these assignments of error is as follows:

Section 2 of the Act of May 14, 1880 (21 Stats. 140), provides as follows:

“Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation and shall be allowed thirty days from date of such notice to enter said lands.”

By the Act of June 17, 1902, called the “Reclamation Act” (32 Stats. 388), Congress gave to the Secretary of the Interior power to withdraw from public entry lands required for irrigation work contemplated under the provisions of the act, and to restore to public entry any of the lands so withdrawn when in his judgment such lands are not required for the purposes of the act; and the Secretary of the Interior is also authorized at or immediately prior to the time of beginning surveys for any contemplated irrigation work, to withdraw from entry, except under the Homestead Laws, any public lands believed to be susceptible of irrigation from said work.

Now, if a person contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead or timber culture entry and was notified by the register of the land office of the district in which said land was situated of said cancellation, he would be allowed by the Act of May 14, 1880 (12 Stats. 140), the preference right of thirty days from the date of said notice to enter said land. But if, at the time he instituted his contest and at the

time he won his contest and was notified that the person's entry against whom he contested had been canceled, the lands had been withdrawn from entry by the Secretary of the Interior acting under the authority of the Reclamation Act of June 17, 1902 (32 Stats. 388), thus making it impossible for the successful contestant to exercise his preference right as granted him by the Act of May 14, 1880, within the thirty days as specified in said act, would he thereby lose the benefits of his contest or would his preference right be suspended until such time as the lands were reopened for entry, and would he have thirty days from the date on which the lands were thrown open to entry within which to exercise his preference right?

The Secretary of the Interior has decided, in a number of decisions which will be hereafter cited and quoted, that the preference right thus gained would be so suspended. Counsel for plaintiffs in error contend that the preference right would not be so suspended and that the decisions of the Secretary of the Interior to that effect are erroneous.

It will be noted from the statement of facts [Tr. p. 83] that J. M. Ocheltree received his preference right on September 30, 1908, and that Patrick H. Bodkin received his preference right on the 19th day of April, 1910. [Tr. p. 84.] It will further be noted that the instructions given by the court to the jury [Tr. p. 80], in which defendants allege error, do not touch upon the preference rights of said Ocheltree and Bodkin, the court simply instructing the jury that Ocheltree, by virtue of the allowance of his entry on June 1, 1912, by the United States Land Office, and the said Bodkin

by virtue of the allowance of his entry on June 1, 1912, by the United States Land Office, thereby secured the right by the Constitution and laws of the United States to make settlement and residence upon the lands as described in the indictment, and to cultivate the same and in other respects comply with the public land laws of the United States relating to homesteads, so as to earn and procure title to said lands. These instructions were given by the trial court undoubtedly with the view that the decisions of the Land Department granting to the said Ocheltree and Bodkin the right to enter the said lands as homesteads, could not be collaterally attacked in a criminal case. That is, that the court in the trial of a criminal case would not collaterally inquire into the grounds upon which a decision of the officers of the Land Department had been rendered.

This, therefore, is the first contention by the defendant in error in support of the judgment of the trial court.

POINTS, AUTHORITIES AND ARGUMENT OF DEFENDANT IN ERROR.

PROPOSITION NO. 1.

A decision rendered by the officers of the Land Department upon a question of fact is undoubtedly conclusive, and not subject to be reviewed by the courts in absence of a showing that such decision was rendered in consequences of fraud or the entire lack of evidence, and can be attacked only in a court of equity

by a direct proceeding for that purpose and not by a collateral proceeding.

This proposition is so firmly established in our law that it would seem hardly necessary to cite authorities in support of it. The following is a list of a few of the leading cases by the various courts of the United States upon this proposition:

In 232 U. S. 110, 116, 117, in the case of *Ross v. Day*, Mr. Justice Pitney says, in part, as follows:

“In *Whitcomb v. White*, 214 U. S. 15, 16, this court, speaking by Mr. Justice Brewer, said: ‘The decision of the Land Department was not rested solely upon the fact that White’s formal application was filed a few hours before that of the trustee for the occupants of the townsite, but rather chiefly upon the priority of the former’s equitable rights. So far as such decision involves questions of fact it is conclusive upon the courts.’ (*Johnson v. Towsley*, 13 Wall. 72, 86; *Shepley v. Cowan*, 91 U. S. 330, 340; *Marquez v. Frisbie*, 101 U. S. 473, 476; *Quinby v. Conlan*, 104 U. S. 420, 425, 426; *Burfenning v. C., St. P., M. & O. Ry.*, 163 U. S. 321, 323; *De Cambra v. Rogers*, 189 U. S. 119, 120.) And this rule is applied in cases where there is a mixed question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is. As said by Mr. Justice Miller in *Marquez v. Frisbie*, *supra* (101 U. S. 473), p. 476: “This means, and it is a sound principle, that where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has con-

fided the matter is conclusive.' And see *Moore v. Robbins*, 96 U. S. 530, 535; *Gonzales v. French*, 164 U. S. 338."

See also:

Vance v. Burbank, 101 U. S. 514, 519;

Lee v. Johnson, 116 U. S. 48;

Gertgens v. O'Connor, 191 U. S. 237, 240;

Hartwell v. Havighorst, 196 U. S. 635;

Potter v. Hall, 189 U. S. 292, 300;

Whitcomb v. White, 214 U. S. 15;

Logan v. Davis, 233 U. S. 613, 623, and cases cited;

Southern Development Co. v. Endersen, 200 Fed. 272, 278, 280, 281;

Sullivan v. Damon, 202 Fed. 285;

West v. Rutledge Timber Co., 210 Fed. 189.

And see also:

32 Cyc. 1020 (note 38 and cases cited thereunder).

It is equally as well settled by the decisions that the courts cannot exercise any direct appellate jurisdiction over the rulings of the officers of the Land Department, nor can they reverse or correct such rulings in collateral proceedings between private parties, but the decisions of the Land Department are subject to review by the court to the extent that where the department has fallen into error and denied to parties the rights to which they are entitled by the Constitution or laws of the United States, the courts can, *in a proper proceeding*, interfere and refuse to give effect

to the action of the department, or set aside or correct its decisions as *equity* may require. But even this cannot be done until after the title has passed from the government. A decision of the Land Department in a contest will be sustained by the courts unless there are clear and cogent reasons for overthrowing it and unless it appears that there has been a clear misapplication of the law to the facts, and even a *court of equity* will not inquire into any question of a misapplication of the law by the officers of the Land Department to a controverted question of fact before them unless the findings of fact and conclusions of such officers are set out fully in the pleadings of the complaining party. In other words, defendant in error contends that the following authorities absolutely hold that the courts will not collaterally attack a decision of the officers of the Land Department even on a question of law, and that the only method by which a decision of the officers of the Land Department can be attacked is by a direct attack in a court of equity, and that even then a court of equity is slow to correct the rulings of the Land Department:

The Circuit Court of Appeals for the 8th Circuit in the case of *King v. McAndrews et al.*, 111 Fed. 860, says as follows (quoting from p. 864 of the opinion):

“The remedy for an error of law in the action of the department regarding the title to land intrusted to its disposition is by a direct proceeding by a bill in equity to correct it. *James v. Iron Co.*, 46 C. C. A. 476, 107 Fed. 597, 600; *Bogan v. Mortgage Co.*, 63 Fed. 192, 195, 11 C. C. A.

128, 130, 27 U. S. App. 346, 350; U. S. v. Winona & St. P. R. Co., 67 Fed. 948, 958, 15 C. C. A. 96, 106, 32 U. S. App. 272, 288; U. S. v. Northern Pac. R. Co., 95 Fed. 864, 870, 37 C. C. A. 290, 296; Cunningham v. Ashley, 14 How. 377, 14 L. Ed. 462; Barnard v. Ashley, 18 How. 43, 15 L. Ed. 285; Garland v. Wynn, 20 How. 6, 15 L. Ed. 801; Lytle v. Arkansas, 22 How. 193, 16 L. Ed. 306; Lindsey v. Hawes, 2 Black 554, 562, 17 L. Ed. 265; Johnson v. Towsley, 13 Wall. 72, 85, 20 L. Ed. 485; Moore v. Robbins, 96 U. S. 530, 538, 24 L. Ed. 848; Bernier v. Bernier, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152. * * *

“These established principles have been restated and these authorities have been again cited because they control the disposition of the case in hand, and because counsel for the defendants seem to be impressed with the view that every decision by the Land Department of the many grave and complicated issues which condition the rightful issue of a patent is a mere ministerial act, open to collateral attack for every error of law into which the officers of that department may fall, in every action at law in which the title under the patent is involved. 104 Fed. 432. Such is not the law. The decisions of that department are judicial acts. The patents it issues are judgments of a quasi judicial tribunal. In cases within its jurisdiction they are presumptively right, and as impervious to collateral attack for errors of law or for mistakes of fact as the judgments of the courts, and all cases are within the jurisdiction of this department in which Congress has intrusted to it the determination of the rights of the claimants, and the disposition of the land in accordance with its decision.”

In the case of *Emmons v. U. S.*, 175 Fed. 514, the Circuit Court of the District of Oregon, in an opinion by Judge Wolverton, holds in part as follows:

“It has become well settled that the Land Department, in passing upon matters of fact, within the scope of its jurisdiction to hear and determine questions relating to the sale and disposal of the public lands, acts judicially, and that its findings and judgments become conclusive and binding, as the judgments and decrees of courts of general jurisdiction are conclusive and final, and are preclusive of the matters adjudicated in all other proceedings. I quote from *Smelting Company v. Kemp*, 104 U. S. 636, 640, 26 L. Ed. 875:

“‘In that respect they (the officers of the Land Department) exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceedings for its correction or annulment.’

“The doctrine is again affirmed in its fullest import, in *Noble v. Union River Logging Railroad*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123, where numerous authorities are cited in its support. Now, if it be, as is alleged in the answer, that the adjudication of the Land Department in canceling the entries of Graham, Jones and Steinhardt, proceeded upon the ground that they were obtained, not in good faith, but in fraud of the government, then the judgment of the department

is conclusive of the fact, and plaintiff cannot get behind it here. This proceeding is entirely collateral to the proceeding under which it was sought to acquire the title to these lands, and in which the entries were canceled, and hence the regularity of that proceeding cannot be questioned in a cause of this nature.”

Also, in the case of *James et al. v. Germania Iron Company*, the Circuit Court of Appeals, 8th Circuit, 107 Fed. 597, in an opinion by Judge Sanborn, held:

“The Land Department of the United States is a *quasi* judicial tribunal, invested with authority to hear and determine claims to the public land subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack and presumptively right. A patent to land of the disposition of which the department has jurisdiction, is both the judgment of that tribunal and a conveyance of the legal title to the land. 9 Stats. 395, c. 108, sec. 3; Rev. Stats. secs. 441, 453; *U. S. v. Winona & St. P. R. Co.*, 67 Fed. 948; 32 U. S. App. 272.”

And also, in the case of *King v. McAndrews et al.*, 111 Fed. 860, the Circuit Court of Appeals for the 8th Circuit, through Judge Sanborn, said in part as follows:

“The Land Department of the United States, including in that term the Secretary of the Interior, the commissioner of the general land office and their subordinate officers, constitutes a special tribunal vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of and with

power to execute its judgments by conveyances to the parties entitled to them. 9 Stats. 395, c. 108, sec. 3; 5 Stats. c. 352, sec. 1.

“A patent of land within its jurisdiction issued by the Land Department is a judgment of that tribunal and a conveyance of legal title to the land to the patentee in execution of the judgment.

“When such a patent to land within the jurisdiction of the department is issued, it is, like the judgments of other judicial tribunals, impervious to collateral attack. * * *

“But land which the department is vested with the power and charged with the duty to hear and decide the claims of applicants for, and to dispose of in accordance with its decision, is within its jurisdiction, and its patent of such land conveys the legal title to it, and is impervious to collateral attack, whether its decision is right or wrong. *Minter v. Crommelin*, 18 How. 87, 89, 15 L. Ed. 279; *U. S. v. Schurz*, 102 U. S. 378, 401, 26 L. Ed. 167; *Moore v. Robbins*, 96 U. S. 530, 533, 24 L. Ed. 848; *French v. Fyan*, 93 U. S. 169, 172, 23 L. Ed. 812; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800; *Refining Co. v. Kemp*, 104 U. S. 636, 645-647, 26 L. Ed. 875; *Steel v. Refining Co.*, 106 U. S. 447, 450, 452, 1 Sup. Ct. 389, 27 L. Ed. 226; *Lee v. Johnson*, 116 U. S. 48, 49, 6 Sup. Ct. 249, 29 L. Ed. 570; *Heath v. Wallace*, 138 U. S. 573, 585, 11 Sup. St. 380, 34 L. Ed. 1063; *Knight v. Association*, 142 U. S. 161, 212, 12 Sup. Ct. 258, 35 L. Ed. 974; *Noble v. Railroad Co.*, 147 U. S. 174, 13 Sup. Ct. 271, 37 L. Ed. 123; *Barden v. Railroad Co.*, 154 U. S. 288, 327, 14 Sup. Ct. 1030, 1038, 38 L. Ed. 992, 1001. In the case last cited the Supreme Court said:

“‘It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land, upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts and, in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.’”

And the same holding was also made in the case of *Howe et al. v. Parker et al.*, 190 Fed. 738.

Mr. Justice Field, in the case of *Quinby v. Conlan*, 104 U. S. 420, says, in part:

“The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require personal settlement upon the lands desired and their inhabitation and improvement, and a declaration of the settler’s acts and purposes to be made in the proper office of the district, within a limited time after the public surveys have been extended over the lands. By them a land department has been created to supervise all the various steps required for the acquisition of the title of the government. Its officers are required to receive, consider, and pass upon the proofs furnished as to the alleged settlements upon the lands, and their improvement, when pre-emption rights are claimed, and, in case of conflicting claims to the same tract, to hear the contesting parties. The proofs offered in compliance with the law are to be presented, in the first instance,

to the officers of the district where the land is situated, and from their decision an appeal lies to the Commissioner of the General Land Office, and from him to the Secretary of the Interior. For mere errors of judgment as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is by an appeal to his superior of the department. The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers or of their superior in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties.

“In this case the allegation that false and fraudulent representations, as to the settlement of the plaintiff, were made to the officers of the Land Department is negatived by the finding of the court. It would lead to endless litigation, and be fruitful of evil if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. *Johnson v. Towsley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330-340; *Moore v. Robbins*, 96 *Id.* 530.

“And we may also add, in this connection, that the misconstruction of the law by the officers of the department, which will authorize the interference of the court, must be clearly manifest, and not alleged upon a possible finding of the facts from the evidence different from that reached by them. And where fraud and misrepresentations are relied upon as grounds of interference by the court, they should be stated with such fulness and particularity as to show that they must necessarily have affected the action of the officers of the department. Mere general allegations of fraud and misrepresentations will not suffice. *United States v. Atherton*, 102 U. S. 372.

“In the present case the respective claims of the parties to a pre-emptive right to the land in controversy, from their settlement and improvements, had been the subject of earnest contestation before the officers of the Land Department, and a decision in favor of the plaintiff was finally rendered by the Secretary of the Interior. And the question whether the land in controversy had been so freed from its reservation under the Mexican grant as to be open to settlement and pre-emption depended upon matters disclosed by the record of proceedings in the Land Department, namely, that the public surveys had been extended over the land, and that other lands had been appropriated to the satisfaction of the grant.”

Also, in the case of *James v. Germania Iron Company*, heretofore referred to, by the Circuit Court of Appeals for the 8th Circuit, 107 Fed. 597, it was held (quoting from the syllabus, paragraph 5):

“The entry of public land under the laws of the United States, whether legal or illegal, segregates

it from the public domain and appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed."

This is a direct authority in support of our argument herein to the effect that the witnesses Ocheltree and Bodkin were acting in pursuance to a valid, existing decision of the Secretary of the Interior and that the plaintiffs in error, Edwards and Culpepper, certainly could not resist that valid, existing decision with force and arms in attempting to prevent the entry of the witnesses Ocheltree and Bodkin under and by virtue of that decision and that in so doing the plaintiffs in error, Edwards and Culpepper, were depriving the witnesses Ocheltree and Bodkin of rights guaranteed to them under the Constitution and laws of the United States.

That the Land Department has jurisdiction over the public land of the United States is, of course, unquestioned, and the witnesses Ocheltree and Bodkin, in attempting to make entry upon the land in question, were, therefore, acting in pursuance to existing, valid decisions of the Land Department, and even though those decisions might have been erroneous, as they were rendered by a competent tribunal with jurisdiction, undoubtedly the witnesses Ocheltree and Bodkin had the right, under the Constitution and laws of the United States, to do all the things necessary to carry into effect those decisions, until such time as those decisions, if they were erroneous, were reversed by the courts in a proper direct proceeding. This being

true, the trial court was correct in refusing to give the requested instruction of plaintiffs in error [Tr. p. 78] and was likewise correct in giving the instructions [Tr. p. 80] to which plaintiffs in error took exception.

The entire contention of plaintiffs in error and their entire brief is an effort on their part to have this court, in a collateral proceeding, determine the private contest between the plaintiffs in error and the witnesses Ocheltree and Bodkin by reversing the decisions of the Land Department in those matters. In fact, the brief of seventy-seven pages is so plainly an attempt in that respect that counsel for plaintiffs in error, themselves, seek to apologize for the effort at the close of their brief on page 76, wherein they say:

“While we are not herein trying the private contests between the plaintiffs in error and Ocheltree and Bodkin, as to which have superior rights to the lands involved, yet it is interesting, as well as helpful, in arriving at a correct solution of the question herein, to view the exact situation as it was presented to the Land Department when it rejected the entries of Culpepper and Edwards, and denied their preference rights as settlers, on June 1, 1912, at the same time giving validity to the so-called preference rights of Ocheltree and Bodkin by receiving and accepting their entries.”

The issues as presented by the brief of plaintiffs in error are certainly nothing else other than the determination of the private interests between the plaintiffs in error and the witnesses Ocheltree and Bodkin and as said heretofore the witnesses Ocheltree and Bodkin were acting in pursuance to valid, existing decisions

of the Secretary of the Interior and the plaintiffs in error, Edwards and Culpepper, certainly could not resist those valid, existing decisions with force and arms and then try out the private interests of themselves and the witnesses Ocheltree and Bodkin in this case wherein the said plaintiffs in error, Edwards and Culpepper, are charged with depriving citizens of the United States of the rights guaranteed to them under the Constitution and laws of the United States.

We believe this substantially answers the contention made by plaintiffs in error, and that there is, therefore, no error in the record, and that the judgment of the trial court should be affirmed.

However, if this Honorable Court is of a different opinion, and believes that it was incumbent upon the trial court to inquire into the validity and correctness of the decisions of the Land Department, in reference to the preference rights under which the witnesses Bodkin and Ocheltree were allowed entry by the Land Department, we have to submit the following proposition in support of the decisions of the Land Department:

PROPOSITION No. 2.

The witness Patrick H. Bodkin exercised his preference right within thirty days of notice of the cancellation of the entry he was contesting. In other words, the said Bodkin exercised his preference right within the period prescribed by the Act of Congress of May 14, 1880 (21 Stats. 140).

It will be noted from the transcript [Tr. p. 82], that

the lands referred to in the indictment were withdrawn under the Reclamation Act (32 Stats. 388) on the 12th day of September, 1903, by order of the Land Department. That prior to said withdrawal the land described in count number 2 of the indictment in this case, to-wit, the northeast quarter of section eleven, township seven south, range twenty-two east, San Bernardino Base and Meridian, had been entered by the defendant William B. Edwards under the Homestead Laws of the United States; that thereafter, while the lands described in said count number 2 of the said indictment were still withdrawn from entry, the said Patrick H. Bodkin duly filed a contest in the land office at Los Angeles. [Tr. p. 84.] That hearing was duly had on said contest in the local land office and the contest duly forwarded to the Commissioner of the General Land Office at Washington and by him decided in favor of the said Patrick H. Bodkin on the 25th day of June, 1909, the said Commissioner, by his decision, holding the said homestead entry of the said William B. Edwards *for cancellation*, and that notice of that decision, that is, that the Commissioner held the homestead entry of the said Edwards *for cancellation* was given to the said Patrick H. Bodkin prior to the first day of January, 1910. [Tr. p. 84.] That thereafter the said William B. Edwards took an appeal from said decision of the Commissioner to the Secretary of the Interior and the Secretary of the Interior on the 19th day of April, 1910, made an order canceling the said homestead entry of the said William B. Edwards on said land and awarded to the said Patrick

H. Bodkin a preference right to enter upon said land [Tr. p. 84]; that on the 10th day of January, 1910, by an order duly made and entered by the Land Department the said lands described in count number 2 of said indictment among other lands, were restored to public settlement on April 18, 1910, and to public entry on May 18, 1910 [Tr. p. 84] and that, on May 18, 1910, the said Patrick H. Bodkin filed his application to homestead the said land described in count number 2 of the said indictment on the basis and by virtue of the preference right granted by the Land Department of the United States by the decision of the Secretary of the Interior on the 19th day of April, 1910. [Tr. p. 85.] It will thus be seen from the transcript that so far as count number 2 of the indictment is concerned the said Patrick H. Bodkin having been given notice of the cancellation of the Edwards entry and awarded his preference right on the 19th day of April, 1910, and having made entry on the said land on May 18, 1910, exercised his preference right within the thirty day period as prescribed by the Act of Congress heretofore referred to and that so far as the said count number 2 of said indictment is concerned and the instruction of the court [Tr. pp. 51, 93] referring to the said Patrick H. Bodkin, there was no error even though we grant the contention of the plaintiffs in error.

Counsel for plaintiffs in error have evidently overlooked the fact that the Edwards entry was not cancelled on the 25th day of June, 1909, by the commissioner, but that the Commissioner, by his decision,

merely held the said Edwards entry *for cancellation*. [Tr. p. 84.] The meaning of said decision being simply that in view of the fact that the said Edwards had a right of appeal to the Secretary of the Interior his entry was not canceled but was merely held for cancellation pending his right of appeal and that in view of the fact that he did exercise his right of appeal to the Secretary of the Interior his entry was not finally canceled until the 19th day of April, 1910, on which day his entry was for the first time cancelled, notice of which decision was at that time given to the witness Patrick H. Bodkin.

That instruction of the court in reference to count number 2 of the said indictment [Tr. pp. 51, 93] being the only error assigned by plaintiffs in error in reference to the trial and conviction under said count number 2 of said indictment, it must be held by this court that the conviction and judgment of the court of the defendants on said count number 2 of said indictment must be affirmed.

In support of the judgment of the trial court insofar as count number 1 of said indictment is concerned and of the charge of the court as given under said count number 1 of said indictment [Tr. pp. 50, 92] defendant in error desires to submit the following further propositions:

PROPOSITION No. 3.

Where a period of time is fixed by statute of the government or state, or is fixed by any court, for the performance of any act, and that government, or that

state, or that court, puts some obstacle in the way which shall or does prevent the performing of that act within the time prescribed, then the time for the performance of said act is extended beyond the period fixed by said government, state or court, for the performance of said act, for a time equal in length to the time during which said obstacle was in existence.

This was a rule of common law and has been carried into the statutes of most states. We find it carried into the statutes of California in various places; among others, sections 356, 357 and 358 of the Code of Civil Procedure, section 356 providing, in part, as follows:

“When the commencement of an action is stayed by statutory prohibition, the time of the continuance of the prohibition is not part of the time limited for the commencement of the action,”

and section 357 provides:

“No person can avail himself of a disability unless it existed when his right of action accrued.”

And section 358 provides:

“When two or more disabilities co-exist at the time the right of action accrues, the limitation does not attach until they are removed.”

Therefore, we submit that the decisions of the Secretary of the Interior extending the preference right as granted by the Act of May 14, 1880 (21 Stats. 140) were correct. The Act of May 14, 1880, granted a preference right of thirty days from time of notice to a successful contestant of the winning of his contest when considered in connection with the Reclama-

tion Act of June 17, 1902 (32 Stats. 388), and the actions of the Secretary of the Interior under the authority of that act will demonstrate that principle.

In pursuance of the Reclamation Act of June 17, 1902, the Secretary of the Interior withdrew from public entry the lands described in count number 1 of the indictment in this case. Thereafter said witness Ocheltree duly contested one Danford Arnold and was entitled to a preference right of entry on said lands for thirty days from the 30th day of September, 1908. He could not exercise that right because of the action of the secretary, acting pursuant to the act of Congress, withdrawing the said lands from entry, and, under the rule of law heretofore set forth, the witness Ocheltree was therefore entitled to 30 days from the time the obstacle was removed, that is, thirty days from the time the said lands were restored to entry, and that is what he was given by the decisions of the Secretary of the Interior.

There is still another view under which the decisions of the Secretary of the Interior extending the thirty days preference right beyond the period fixed by the Act of May 14, 1880, and particularly the decision of the Secretary of the Interior in favor of the said witness Ocheltree, can be upheld, which we respectfully submit as Proposition No. 4.

PROPOSITION No. 4.

Where an executive department of the government has exercised certain powers—or rendered certain decisions—for a long number of years which have never been denied, either legislatively or judicially, Congress

will be held to have acquiesced in the action of the executive department.

This proposition is based upon the late case of the *United States v. Midwest Oil Company*, decided by the Supreme Court of the United States, February 23, 1915, construing the validity of the action of the President in withdrawing from private acquisition certain lands which Congress had made free and open to acquisition and purchase. In that case the United States argued that the President, as commander-in-chief of the army and navy, had power to make the order withdrawing said lands, for the purpose of retaining and preserving a source of fuel supply for the navy and that the President, being charged with the care of the public domain, could, by virtue of the executive power vested in him by the Constitution and also in conformity with the tacit consent of Congress, withdraw in the public interest any public land from entry or location by private parties. The appellees, the *Midwest Oil Company et al.*, insisted that there was no dispensing power in the executive, and that he could not suspend a statute or withdraw from entry or location any lands which Congress had affirmatively declared should be free and open to acquisition by citizens of the United States. They therefore insisted that the withdrawal order was absolutely void since it appeared upon its face to be an attempt to suspend a statute.

In a very able opinion by Mr. Justice Lamar, the Supreme Court, among other things, said the following:

“We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long continued practice to make orders like the one here involved. For the President’s proclamation of September 27, 1909, is by no means the first instance in which the executive, by his special order, has withdrawn land which Congress by general statute had thrown open to acquisition by citizens, and while it is not known when the first of these orders was made, it is certain that ‘the practice dates from an early period in the history of the government.’ *Griscar v. McDowell*, 6 Wall. 381. Scores and hundreds of these orders have been made, * * * and he has during the past eight years, without express statutory authority—but under the claim of power so to do—made a multitude of executive orders which operated to withdraw public land that would otherwise have been open to private acquisition. (Here were cited a number of instances wherein the President had exercised a like power.)

“It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long continued action of the executive department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule

that in determining the meaning of a statute or the existence of a power weight shall be given to the usage itself, even when the validity of the practice is the subject of investigation.

“This principle, recognized in every jurisdiction, was first applied by this court in the often cited case of *Stuart v. Laird*, 1 Cranch. 299. There, answering the objection that the Act of 1789 was unconstitutional insofar as it gave circuit power to judges of the Supreme Court, it was said (1803) that ‘practice and acquiescence under it for a period of several years commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled.’

“Again, in *McPherson v. Blacker*, 146 U. S. 1, where the question was as to the validity of the state law providing for the appointment of presidential electors, it was held that as the terms of the provision of the Constitution of the United States left the question of the power in doubt, the ‘contemporaneous and continuous subsequent practical construction would be treated as decisive.’ *Fairbanks v. U. S.*, 181 U. S. 307; *Cooley v. Board of Wardens*, 12 Howard 315. See also *Grizar v. McDowell*, 6 Wall. 364, where, in 1867, the practice of the executive department was referred to as evidence of the validity of these orders making reservations of public land even when the practice was by no means so general and extensive as it has since become.

“These decisions do not, of course, mean that private rights could be created by an officer with-

drawing for a railroad more than had been authorized by Congress in the land grant act. *Southern Pacific v. Bell*, 183 U. S. 685; *Brandon v. Ard*, 211 U. S. 21. Nor do these decisions mean that the executive can by his course of action create a power. But they do clearly indicate that the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the executive in the management of the public lands. 'This is particularly true in view of the fact that the land is property of the United States and that the land laws are not of a legislative character in the highest sense of the term (art. 4, sec. 3), 'but savor somewhat of mere rules prescribed by an owner of property for its disposal.' *Butte City Water Co. v. Baker*, 196 U. S. 126.

"These rules or laws for the disposal of public land are necessarily general in their nature. Emergencies may occur, or conditions may so change as to require that the agent in charge should in the public interest, withhold the land from sale; and while no such express authority had been granted, there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. The power of the executive, as agent in charge, to retain that property from sale need not necessarily be expressed in writing. *Lockhart v. Johnson*, 181 U. S. 520; *Bronson v. Chappell*, 12 Wall. 686; *Campbell v. City of Kenosha*, 5 Wall. 194 (2)."

This case, we believe, absolutely sustains the position of the government as stated in Proposition 4 above, in view of the fact that the Secretary of the Interior and the other officers of the Land Department have, for a long number of years, acting pursuant to the jurisdiction given them over the public lands of the United States and their construction of the public land laws, recognized, by their decisions, the right of a successful contestant who won his contest while land was withdrawn from entry, to thirty days from the time of notice to him that the land was restored to entry within which to exercise the preference right granted to him by Congress. There have undoubtedly been a number of decisions rendered by the Land Department to the above effect which have not been reported, but among the reported cases we find the following, which, by the way, refer only to reclamation withdrawals and the relation of preference rights thereto.

In the case of *Fairchild v. Eby*, 37 Land Dec. 362, decided December 28, 1908, the Secretary of the Interior, among other things, says the following:

“The case is now before this department on appeal, filed by Sherman D. Fairchild, which contends that the contest should not have been entertained in the first instance because said land is within a government reserve and that even if a preference right ever existed in favor of Daniel A. Eby by reason of his contest, it was for thirty days next after notice to him after the cancellation of Spangler’s entry.

“The contention of Fairchild that the contest should not have been allowed would be tenable but for the regulations of the department of June 6, 1905 (33 L. D. 607), the sixth section of which expressly provides for the allowance of contests against any entry covered by a withdrawal for reclamation purposes, whether the withdrawal is of lands for use in the construction and operation of reclamation works, or of lands susceptible to irrigation from such works.

“When a contest is filed under said rule against an entry which is covered by a withdrawal for use by the government, the seventh section of said regulations provides that the land cannot be appropriated by a successful contestant so long as the lands remain withdrawn; ‘but any contestant who gains a preferred right to enter such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry.’

“It was thus contemplated that the preference right allowed by the sixth section should remain suspended if the land was not subject to entry at the date of cancellation, but that the preference right so acquired might be exercised whenever the land was restored. Whether a contest challenging the validity of any entry should or should not be allowed is a matter resting within executive jurisdiction, but when it has been allowed, and in pursuance thereof the entry has been canceled as the result of such contest, the right of the successful contestant to a preference right of entry of such land whenever it is restored to entry is a legal right given by the statute and cannot be controlled by executive discretion.

“It follows that after the land has become subject to entry, Eby was entitled to the usual notice provided by the statute of the preference right to make entry of the land within the statutory period.”

Also, in the case of *Wright v. Francis et al.*, 36 Land Dec. 499, decided June 6, 1908, a case wherein Wright, on July 30, 1903, instituted a contest against the entry of one Armstrong, the Land Department withdrawing the land from entry on June 13, 1904, the contest being decided in favor of Wright on April 24, 1905, while the land was still withdrawn from entry, the Secretary of the Interior, in reviewing the decision of the Commissioner, who had held that Wright's preference right did not expire within the thirty days after notice of the cancellation of the Armstrong entry, said, in part, as follows:

“You hold that Wright in view of the withdrawal and restoration to entry of the land in controversy, made valid use of his preference right and sustain his application. * * *

“In view of the reasons underlying section 7 of the Circular of June 6, 1905 (33 L. D. 607), and the fact that no valid application to make homestead entry for this tract was then pending, it is held that the time within which Wright could use his preference right did not expire until thirty days after June 20, 1905, the date upon which said land was subject to entry, and that his application was submitted in time for consideration. This is clearly in accord with departmental action in the unreported case of Edwin P. Marshall, assignee, of date September 12, 1907,

and under the circumstances shown by the record, the unreported case of Hufford v. Waugh, of June 26, 1906, will not be followed.

“It is noticed that Wright’s application was filed before the date fixed upon which this land was to become subject to entry, but the time allowed him to use his preference right as then understood was about to expire, no ruling having been made allowing such right to be exercised thirty days after the date of restoration of the lands to entry. Under the circumstances his application will be considered as made in due and proper time.”

To the same effect is the case of Beach v. Hansen, 40 Land Dec. 607, rendered April 3, 1912, and also the case of Wells v. Bodkin, 42 Land Dec. 340, rendered August 29, 1913, and also the case of Edwards v. Bodkin, 42 Land Dec. 172, decided May 27, 1913.

To the same effect is the case of Joseph F. Gladeux, 41 L. D. 286, where the department holds as follows (quoting from the syllabus):

“A successful contestant of an entry within a reclamation withdrawal is not barred of his preference right by section 5 of the Act of June 25, 1910, but said act has the effect to postpone the exercise of such right until the project is so far completed that water can be applied to the land and the Secretary of the Interior has made public announcement of that fact.”

Attention is also directed to circular in reference to “Laws and Regulations Relating to the Reclamation of Arid Lands by the United States,” approved by the

Secretary of the Interior Feb. 6, 1913, and particularly to the regulations as contained in said circular, to be found in 42 Land Decisions, commencing at p. 365. These regulations, as shown by section 1, are promulgated under authority of the Reclamation Act of June 17, 1902, and section 26 of those regulations, found on page 370 of 42 Land Decisions, provides, among other things, as follows:

“When any entry for lands embraced within a first or second form reclamation withdrawal is cancelled for any reason such lands become subject immediately to such withdrawal. Such lands under first form withdrawal cannot therefore, so long as they remain so withdrawn, be entered or otherwise appropriated either by a successful contestant or any other person; but any contestant who gains a preference right to enter any such first form withdrawal lands may exercise that right at any time within 30 days from notice that the lands involved have been restored to public domain or the withdrawal changed to second form. * * *

PROPOSITION No. 5.

However, regardless of the propositions heretofore advanced, we find direct authority in the Act of Congress of June 17, 1902, known as the “Reclamation Act,” in support of the rules and regulations promulgated by the Secretary of the Interior, which rules and regulations as we shall hereafter show, expressly provided that if a contest were won during the time when lands were withdrawn under the Reclamation Act, the successful contestant would have thirty days

from the date the lands were thrown open to entry within which to exercise his preference right.

It will be remembered that the Act of Congress granting to the successful contestant the preference right of thirty days from the date of notice to him that the entry he contested had been cancelled was passed May 14, 1880. It will also be remembered that lands described in the indictment in this case were withdrawn by order of the Secretary of the Interior under and by virtue of the Act of June 17, 1902, known as the Reclamation Act. [Tr. p. 82.]

Section 3 of the Reclamation Act of June 17, 1902 (32 Stats. 388) provides, in part, as follows:

“That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, *and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act*; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, that all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; * * * the Secretary of the Interior shall determine whether or not said project is practica-

ble and advisable, and if determined to be impracticable and unadvisable, he shall thereupon restore said lands to entry."

And section 10 of the same act provides as follows:

"That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect."

The order of the Secretary of the Interior withdrawing under the Reclamation Act the lands described in the indictment was issued September 12, 1903 [Tr. p. 82], and thereafter, on June 6, 1905, the Secretary of the Interior, in pursuance of the power given him by section 10 of the Reclamation Act heretofore set out, promulgated the following rules or regulations in reference to the lands theretofore withdrawn by him under the Reclamation Act:

"Sixth. Any entry embracing lands included within any withdrawal, made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and cancelled because of entryman's failure to comply with the law or for any other sufficient reason, *and any contestant who secures the cancellation of such entry and pays the land office fees, occasioned by his contest, will be awarded a preferred right of making entry under the Reclamation Act, provided the lands involved are not embraced within a withdrawal of the first form.*

“Seventh. When any entry for lands embraced within a withdrawal *under the first form* is cancelled by reason of contest or for any other reason, such lands become subject immediately to such withdrawal and cannot, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; *but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry.*”

Transcript, page 83, shows that the witness J. M. Ocheltree, received his preference right to make entry on the lands described in count one of the indictment, on the 30th day of September, 1908, and those lands on that date were therefore subject to the rules and regulations of the Secretary of the Interior of June 6, 1905, as hereinabove set out, the next rules and regulations by the Secretary of the Interior not having been promulgated until January 19, 1909 (37 L. D. 365).

Counsel for plaintiffs in error has, in some inexplicable manner, entirely misconstrued the rules and regulations of June 6, 1905, in that they contend throughout their brief that section 6 of said rules and regulations expressly deny a preference right to a successful contestant of an entry on lands included within a first form withdrawal, and they fail entirely to note that section 7 of the same rules and regulations does expressly provide for a preference right to a successful

contestant of an entry on lands included within the first form withdrawal.

It will be remembered that lands withdrawn under a first form withdrawal cannot be entered, selected or located in any manner so long as they remain so withdrawn, and that those lands embrace the lands that may possibly be needed in the construction and maintenance of irrigation works, but that lands withdrawn under the second form can be entered under the homestead laws, subject to the provisions of the Reclamation Act, and that those lands embrace lands which are not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works. (See Circular June 6, 1905, 33 L. D. 607.)

It will be noted, therefore, from the above understanding of the difference between lands withdrawn under a first form withdrawal and lands withdrawn under the second form, that section 6 of the Circular of June 6, 1905, provides, in substance, that an entry embracing lands included within *any* withdrawal made under either of the forms mentioned, and whether such entry was made before or after the date of such withdrawal, may be contested and cancelled, and that any contestant who secures the cancellation of such entry will be awarded a preference right of making entry under the Reclamation Act, provided the lands involved are not embraced within a withdrawal of the first form. Meaning simply, that a contest could be instituted against an entry embracing lands included within either a first or second form withdrawal, but

that if the contestant were successful and the lands were withdrawn under the second form, he would be allowed a thirty days preference right, but if the lands were withdrawn under a first form withdrawal in view of the fact that the successful contestant could not exercise his preference right, as he could not make entry, section 7 of the Circular of June 6, 1905, by its express terms, took care of the rights of the successful contestant who thus secured a preference right to make entry on lands withdrawn under a first form withdrawal. Section 7 starts out from the very beginning by saying:

“When an entry for lands embraced within a withdrawal under the first form is cancelled by reason of contest or for any other reason, such lands become subject immediately to such withdrawal and cannot, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; *but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry.*”

The reading of these two sections is so very plain that it is hard to understand how counsel for plaintiffs in error have misread them. A greater part of their brief is based upon their erroneous reading of these two sections whereby they construe those sections to expressly deny the preference right to a successful contestant of an entry on lands included within the

first form withdrawal, whereas, as above shown, section 7 of that circular, quoted by counsel for plaintiffs in error themselves on page 24 of their brief expressly states that it is dealing with granting a preference right to a successful contestant of an entry on lands included within the first form withdrawal. It would seem that this mistake of counsel for plaintiffs in error is responsible for this appeal, as those sections themselves considered with the authority under which they were promulgated absolutely answer every contention that counsel for plaintiffs in error has made in their brief.

As above stated, the witness J. M. Ocheltree received notice of the successful termination of his contest against the entry of one Danford Arnold on the 30th day of September, 1908, while the lands described in the indictment were withdrawn under the Reclamation Act [Tr. p. 83] and by virtue of section 7 of the Circular of June 6, 1905, he had gained under the Constitution and laws of the United States the preference right to enter those lands in exercise of his preference right at any time within thirty days from notice that the lands involved had been released from such withdrawal and made subject to entry. The lands described in count one of the indictment were, on the 10th day of January, 1910, by an order of the Secretary of the Interior, among other lands, restored to public settlement on April 18, 1910, and public entry on May 18, 1910. [Tr. p. 84.] Transcript, page 85, further shows that on May 18, 1910, J. M. Ocheltree filed his application for a homestead upon the said

lands described in count one of the indictment upon the basis and by virtue of the preference right theretofore granted him by the Land Department of the United States, thus exercising his preference right within thirty days from April 18, 1910, the date on which the lands were retsored to public settlement.

Thereafter, the entry of J. M. Ocheltree thus made on May 18, 1910, was on June 3, 1912, allowed by the Land Department. This undoubtedly gave him the right under the Constitution and laws of the United States, to make entry and settlement on that particular land and otherwise comply with the United States land laws, and as Judge Wellborn of the trial court so instructed the jury [Tr. pp. 50 and 92] we submit that there was no error in that instruction.

Your attention is also invited to the fact that since the preference right of J. M. Ocheltree was granted on the 30th day of September, 1908, and that since it was granted under section 7 of the rules and regulations of the Department of the Interior of June 6, 1905, the claim of counsel for plaintiffs in error that by the Departmental Rules and Regulations of January 19, 1909, the preference right of Ocheltree theretofore granted was cancelled *ipso facto*, would be depriving the witness Ocheltree of his rights as guaranteed under the Constitution, by means of an *ex post facto* law, and it was undoubtedly in consideration of these rights gained under the Rules and Regulations of June 6, 1905, and bearing in mind that the Rules and Regulations of January 19, 1909, would not apply to the case of Ocheltree, that the Land Department al-

lowed his entry under his preference right granted September 30, 1908, and which finding the Secretary of the Interior later affirmed by affirming the decision of June 3rd, 1912, of the Commissioner allowing the homestead application of said Ocheltree.

Judge Sanborn, speaking for the Circuit Court of Appeal, Eighth Circuit, in the case of *James et al. v. Germania Iron Co.*, 107 Fed. 602, said:

“The rights of these parties vested on February 23, 1889. They were initiated under and conditioned by the laws of the land and the rules and practice of the department on that day and no subsequent rules, decisions or practice could divest them of the property they then secured or deprive them of their equitable or legal rights to the title to the land which they then acquired. *Cornelius v. Kessel*, 128 U. S. 456; *Shreve v. Cheesman*, 69 Fed. 785. For this reason the subsequent practice and decisions of the department, which have been carefully considered, will not be reviewed at length in this opinion, but will be here laid aside with the remark that they are without legal effect upon the issues in this case and their examination has proved futile and profitless.”

This is a proposition too well established in our jurisprudence to need support by citing further authorities.

However, it is not conceded that the rules and regulations of the Secretary of the Interior of January 19, 1909, prevented the acquiring of the preference right by a successful contestant upon his paying the Land

Office fees and procuring the cancellation of an entry, even though the land involved were within a first form withdrawal, and in support of the view that said rules and regulations do not prohibit the acquiring of such preference right, we respectfully call attention to the decision of the Land Department in the case of *Edwards v. Bodkin*, 42 L. D. 172, which says, in part, as follows:

“The preference right of entry conferred by the act of May 14, 1880, *supra*, upon any person who ‘has contested, paid the land office fees, and procured the cancellation’ of a homestead entry is a *statutory right which the land department is without authority to deny or disregard by regulations or otherwise*. See *Beach v. Hansen* (40 L. D. 607).

“The regulations of January 19, 1909, *supra*, were intended to apply to lands under *proper withdrawals for public use* and for the protection of public interests. *But where, as in this case, it is found that a withdrawal was made under a misapprehension of fact, said regulations could have no further effect than to postpone the exercise of the preference right until the lands were restored to public entry.*

“The department has given careful consideration to the claims on behalf of Edwards, that he has made *bona fide* settlement on the land and has largely reclaimed the same from its desert state. As has been stated, this department is without authority, as well as without disposition, to disregard the preference right of entry, duly earned by Bodkin under the law.”

Thus, it will be seen that the Secretary of the Interior recognized the preference right gained by a person contesting an entry as a *statutory right* under the Act of May 14, 1880, which could not be changed by any rules or regulations of the department, and that if such rules and regulations did interfere with the rights of a successful contestant and prohibit him from gaining the preference right provided for in said Act of May 14, 1880, said rules and regulations would be void in so far as they interfere with such statutory right of a successful contestant.

For the foregoing reasons, we respectfully submit that there is no merit in the appeal in this case, and there being no other errors properly assigned, and, as we believe the record failing to disclose any, the judgment of the trial court should be affirmed.

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